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AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Volume 25 JUNE, 1941 Number 1

"To Strengthen the Defenses of Democracy"*

By CHARLES EVANS HUGHES, C. J.

The community looks to our judges for competency, efficiency and impartiality, without which codes merely add to an accumulation of legal futilities. Competency, meaning learning in the law and trained skill in its application; efficiency, meaning the avoidance of waste motion, the bringing of litigation to its essential points and promptness in decision; impartiality, which means that the scales of justice are not weighted by prejudice or favor. It is the privilege and duty of the judiciary to demonstrate the capacity of democratic government to have the people's laws administered without "an evil eye and an unequal hand." The community also looks to the administrative agencies, which are multiplied in response to social needs, for competency, efficiency and impartiality in their respective spheres. So far as they exercise the prerogative of hearing and deciding controversies under legal authority, albeit with their own appropriate technique and flexibility, they must commend themselves by exhibiting essential judicial virtues.

In this sphere of judicial activity, we are not crusaders save as we are zealous in upholding the majesty of the law and are keenly intent upon the hearing and deciding the controversies between man and man, and between government and citizen, according to the law and not with any ulterior policy or purpose. Democracy cannot escape its pressure groups. Each interest has its imperious demands. These groups compete in the market place, in the forums of public opinion, in popular elections, and in our legislative halls, but they have no place in the halls of judicial administration.

The lamps of justice are dimmed or have wholly gone out in many parts of the earth, but these lights are still shining brightly here. We are engaged in harnessing our national power for the defense of our way of life. But that way is worth while only because it is the pathway of the just. It is our high privilege, although our task may seem prosaic, to strengthen the defenses of democracy by commending to public confidence and esteem the working of the institutions of justice in both state and union.

*From an address by the Chief Justice before the meeting of the American Law Institute, Washington, D. C., May 6, 1941.

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Annual Report of President David A. Simmons*

To the Members of the Society:

The year that has passed since our last annual meeting has seen a substantial increase in the membership of the Society, an enlargement in both the type and page size of the JOURNAL, and, in general, a steady advance toward the accomplishments of those objects which have constituted the major purposes of the Society since its beginning.

IN MEMORIAM. Like all national organizations, our rolls record the deaths of a number of our members, whose interest and assistance will be greatly missed. Two of these were directors of the Society, Walter S. Fenton of Vermont and Walter S. Ruff of Ohio. Both were public spirited in the highest degree, believed in the validity of the ideals of the Society, and had contributed freely of their time and efforts in its work.

MEETINGS. There have been two interim meetings since last May. In view of the fact that the membership of the Society is widely scattered and that it is advantageous to get groups of the members together whenever possible, the plan has been adopted of holding a brief meeting during the annual convention of the American Bar Association in the fall and another at the time of the winter or spring meeting of the House of Delegates. Pursuant to this policy, a meeting was held on September 11, 1940, in Philadelphia, and another in Chicago on March 17, 1941. Each was well attended and marked by interesting and able discussions of current problems in the administration of justice.

JOURNAL. A change in the typographical make-up of the JOURNAL was accomplished in June, 1940. A larger and more readable type was selected, the page was enlarged, and a soft finished book paper was selected for future use. The compliments received by the Editor on these changes indicate that the JOURNAL'S physical make-up is more attractive and that it is easier to read.

The JOURNAL continues to offer reading matter of practical value to those engaged in the administration of justice, and renders a service in this field not duplicated by any other publication. As a bi-monthly magazine it makes no pretense of printing news items, but it does sum up and interpret the latest developments in judicial administration throughout the country. The columns of the JOURNAL are open for a discussion of all phases of proposals to improve the administration of justice. Articles by those who are authorities in their particular fields are printed in each issue, and we hope the membership will fully participate in this phase of the Society's work as well as in all others.

In addition to its circulation among its members, libraries, and institutions of learning, the policy has continued of sending the JOURNAL free to any person who manifests sufficient interest in its purposes to write and ask that his name be placed on the circulation list. At the present time, the JOURNAL has a circulation of approximately ten thousand copies.

MEMBERSHIP. The membership of the Society continues to grow. Without fanfare and without unduly burdening the officers, directors or members, consistent work is carried on in this field. The plan in use for several years has been continued; that is, when any director or member suggests the name of any lawyer or judge who is or should be interested in the purposes of the Society, the Society gives that person a special invitation to join. This year the headquarters suggested that a goal of four hundred new members be set for the year. One hundred and eleven members and directors suggested one or more names, and many of them joined the president in writing a personal letter to the persons nominated. As a result we are pleased to report that the quota set has been exceeded, and, although the current membership year is not completed as there are a number of invitations in the mail, we have 504 new members as compared with 410 new members at this same date a year ago. The membership of the Society is now approximately 2700, the largest in its history. We are grateful to all who assisted, and put you on notice that renewed efforts in this direction will be expected next fall.

FISCAL. The fiscal year of the Society ended on November 30th. On that date the financial condition of the Society was the best in its history. It had on hand a cash balance of $17,838.45, and receipts for the fiscal year had amounted to $23,242.64. Disbursements

*Delivered at the annual meeting at the Mayflower Hotel, Washington, D. C., May 7, 1941.

for the year were $19,548.20. This apparently bright financial picture must not blind us to the fact that in the future the Society will probably have to rely more and more upon contributions by the members. In the past, donations of considerable size have been made by interested individuals and institutions. For several years the American Bar Association paid the Society three thousand dollars a year to send copies of the JOURNAL to its members. That arrangement terminated a year ago, and income from that source ceased. The Carnegie Corporation has assisted the Society generously with the understanding that self-sufficiency would soon be reached in the financial affairs of the Society. With the disturbed conditions of the country and the world in general, it behooves us to consider soberly our financial future so that the activities of the Society, which have been fruitful of such important results to the administration of justice and consequently to the people at large, may not be curtailed.

JUDICIAL ADMINISTRATION. The past year has been one of considerable accomplishment in the field of judicial administration. Many persons and groups have participated. Bar Associations and their committees and officials have been particularly active. Our Society, as a research and publicity agency, has worked with and been of service to all of them.

The movement for reform of civil procedure, begun with the adoption of the new federal rules in 1938, has assumed nation-wide proportions. Colorado adopted a new code in January; the Texas lawyers have written one which is to become effective in September; and considerable progress is being made on code revision in North Dakota, Rhode Island, Missouri, Florida, and in several other states, as appears in more detail in the April JOURNAL.

The movement for reform of criminal procedure has been greatly stimulated by the passage of the Act of June 29, 1940, by the Congress authorizing the Supreme Court of the United States to prescribe rules of pleading, practice and procedure in criminal cases. The committee appointed by the Supreme Court and its associate committees has commenced work, and we confidently expect that its recommendations, when finally made and adopted, will serve as a standard for similar work in the several states.

Integration of the bar was one of the first proposals of the Society, and it has long since demonstrated its worth and practicability. During 1940, Wyoming and Texas became the twenty-third and twenty-fourth states to set up responsible, self-governing and all-inclusive bar organizations. Louisiana has amended its bar organization to remove political aspects which have troubled that state for some years. Active campaigns continue in Massachusetts, Minnesota, Wisconsin, Montana, Tennessee, Florida and West Virginia. A review of the progress of integration in the several states will be published in the August issue of the JOURNAL.

The adoption of the Missouri plan for selecting judges is an event of importance to American judicature. If this plan is given a fair trial, it will furnish a standard for comparison with other methods which should greatly aid the solution of the perennial problem of judicial selection and tenure.

PROSPECT. Your Society since its organization in 1913 has led the way in some of the most important and extensive improvements in the field of procedural justice. As fine as these accomplishments have been, they do not blind us to the fact that the need for reform is apparently as great as it has ever been. Perhaps, as progress is made toward higher ground, our vision becomes clearer and we can see farther; at least we hope so. Those of us now working at this task must proceed along the way outlined by those men of vision who have preceded us. We earnestly solicit the counsel and support of all who are or should be interested in these pursuits.

Respectfully submitted,

DAVID A. SIMMONS,
President.

THE PRESERVATION of democracy depends upon improvement of the democratic process. In no branch of government is this more important than in the processes of the courts. To improve their processes is peculiarly the duty of the lawyer, and in no field of activity can he render more important service to the institutions of the country.—*Judge John J. Parker.*

"Put Law of National Defense in Order"*

BY ROBERT H. JACKSON†

On page 17 will be found a brief report of the organization speedily created, in response to Mr. Jackson's request, to draft legislation imperatively needed to cope with alien conspirators.

EUROPE HAS resumed its ancient strife, and other peoples of the world are obliged to give considerations of defense and security first place in their thoughts. Our philosophy of government makes the law by which the physical forces of the nation are controlled quite as definitely a part of our defense program as the mobilization of the force itself. We lawyers are again holding spring meetings under the auspices of our several legal societies to consider the state of our law. But we do not feel easy about it because we are finding it really difficult in the present condition of the world to give first consideration to our normal programs, to restatements of the law, to revisions of our court procedures, and to general advancement of the peace time administration of justice. My association with your own and with related societies interested in the betterment of the administration of justice dates from long before I entered public office and makes the office-holder's customary profession of sympathy with your usual purposes superfluous. I can get right down to what is troubling me.

If we should put first things first, the legal profession would turn its highly competent and disinterested legal staffs to resolving the almost unbelievable conflicts, confusions and obscurities in the mass of law that governs our defense activities. I do not suggest that the organized legal profession could or should project itself into the complex and controversial questions of policy that are inherent in many of the legal questions presented to us now. But, apart from any differences over policy, much of our statute law, supplemented by judicial construction in some instances, is technically deficient to meet present-day demands.

It is almost impossible for the legal staffs of the government departments involved, pressed as they are by the routines of their work and immersed as they must be in daily perplexities, to give either the time or the detached thought necessary to the coordination and modernization of the many laws and interpretations of laws relating to defense activities.

There is some further disadvantage that attends our efforts in this direction due to the fact that we inevitably are regarded as proponents of a policy and advocates of an administration, but I venture to say that no more vital effort could be made than to name appropriate representatives of the legal profession and set them upon the task of considering what we may denominate broadly as defense law and its improvement.

Perhaps the greatest single difficulty arises from the changed custom of states as to the method of initiating a war. Our statutes for a century have been framed with the idea that war would begin with a gentlemanly and honorable declaration of war. That chivalrous practice has disappeared. Wars today are fought and won before they are declared. Any nation that in the presence of rising hostility and strain with another awaits a declaration of war to assert itself is as naive as a citizen who expects a burglar to make a formal call to announce his house-breaking intentions.

THE "SECRET WEAPON" OF THE NAZIS

It is safe to say that under modern methods of warfare the most critical period for a nation under attack is the period preceding the actual employment of military force. It is then that forces are set in motion that will expedite or impede the military effort and which will either strengthen or rot out a nation's morale. In country after country, from Czechoslovakia to Greece, we have seen this pattern of a pre-military and non-military invasion, an invasion

*This address was delivered at the annual meeting of the Judicature Society held in Washington, D. C., May 7, 1941.

†Attorney General of the United States.

of business, finance, labor unions, public opinion, and political organizations, all accomplished with the liberal use of expert personnel operating entirely under the protection of the laws of the land being invaded. The secret weapon of the Nazis has been the failure of nation after nation to recognize and deal with this non-military invasion.

Our statute law has in many respects failed to take into account this non-military period of attack. A good many of the government's abilities to deal with its defense still await the existence of a formal state of war. For example, the nation's power to deal with certain disloyal aliens as "enemy aliens" has been considered to await some formal recognition of a state of actual belligerency. Yet we would be blind to the experience of a modern war if we did not recognize that actual activity by foreign agents who are realistically, if not legalistically, enemy aliens does not depend upon any declaration of war.

It may be said generally that most measures of internal defense can be successfully carried out only before the excitement and hysteria and bustle of necessary preparations strike a nation.

DEPARTMENT SERVES TWO MASTERS

We are fully aware in the Department of Justice that we are under the duty to anticipate and prepare for the worst of eventualities, although we may hope and pray for deliverance from them. As the department whose ties are so close to the legal profession that the functioning of our department as a whole may be fairly said to depend in large measure upon the confidence and good will of the profession, it will be of advantage if I tell you frankly some of the things that are troubling us as to the measures that could be taken wisely to discharge this high responsibility. I recognize that the ultimate success of our work and judgment upon it will depend upon the good opinion of those who are more detached than we who are in the heat of the thing can possibly be. You will quickly and rightly condemn us for any neglect of the public interest. You will also quickly and rightly condemn us for any disregard of the rights of individuals to differ with the government and to take measures which are considered to be within the range of their civil liberties, even though they result in some degree of nullification of the government's efforts. In fact, our fate will probably be that a portion of public sentiment will do both.

It is no news to you that it is difficult to serve two masters. Yet the Department of Justice must labor under dual responsibilities. The public rightly expects its law officers to protect what the old indictment forms call "the peace and dignity" of the commonwealth. On the other hand, the most unimpeachable authority commands us to protect and respect the rights of individuals to do many of the very things that may be steps in the process of undermining the stability of the commonwealth.

It is inevitable that in the presence of threats to our national prestige and integrity our people will demand increased emphasis on the rights of the commonwealth. These public pressures for priority to security of the state over the liberty of the individual arouse slumbering conflicts in which emotion, temperament, and experience often divide us more bitterly than the logic of either position would warrant. The task of keeping the confidence of public opinion which shapes today's events and at the same time of steering a course that will be approved by the sober second thought of the nation is not easy.

It will help us to appraise these difficulties if we appreciate that our own principles and techniques for guarding our freedoms are by no means universally accepted among free peoples. In fact, our own system is the exception rather than the rule. The peculiar rigidity and uncompromising character of our American procedures is in sharp contrast with the procedures of Great Britain as they have been detailed for us by an eminent friend of civil liberty, Mr. Harold Laski.

The British solution of this dilemma between public safety and private liberty may be shortly stated as a combination of large official powers coupled with moderation in their exercise. The absence of a written Constitution leaves the government as a whole in possession of all powers which any organized society may possess. Out of its ample power Parliament confers in times of emergency correspondingly broad powers upon England's executive officials. English civil liberties thus depend for their survival, not upon legal limitations so much as upon a high sense of responsibility, a temperament of moderation, and a tradition of non-partisan and non-political action on the part of legislators and executives, and by judges as well. Britain,

to save liberty, relies on limitations bred into the blood and bone of Englishmen and fostered by their culture more than it relies on parchment freedoms.

A GOVERNMENT THAT IS TRUSTED

A recent article by Harold Laski points out that "the Government has powers little short of absolute over the lives and property of its citizens" in Great Britain. For example, a regulation permits prosecution of persons charged with creating alarm and despondency. I think you will agree that a proposal to give any American prosecuting officer such a power would be met with screams of opposition. However, the British Government has apparently made moderate use of the power, prosecuting only about 105 cases. A dozen of them were dismissed. Of those convicted, only 20 were sentenced to imprisonment varying from one day to three months, while the remainder were either bound over or fined.

Under a regulation granting power to suppress processions and public meetings, only three meetings have been prohibited in the whole country. The widest sort of criticism of the government has been tolerated, even from Communists. Yet where national safety was endangered two Communist newspapers were suppressed, pursuant to a control of the press that would not be allowed in this country.

Perhaps the most drastic regulation is one which gives the Home Secretary the power to detain persons whose conduct and views make it seem likely that they may be guilty of action prejudicial to the safety of the realm. Under this power about 1,000 persons are detained. Some others have been arrested and later released. A power so unlimited and so vaguely defined, available against both citizen and alien, is unheard of in America.

PUBLIC OFFICIAL MADE RESPONSIBLE

Whatever the merits or defects of this British policy, the conferring of such broad powers upon a public official leaves little room for an alibi if he does not protect the safety of the state. On the other hand, the existence among his constituents of a vigorous and wholesome respect for civil liberties and for decent treatment of the individual leaves him under a sense of responsibility which goes a long way to prevent abuses of that power. While Mr. Laski does not acquit the police of instances of "stupidity and harshness" and while he admits that "one or two magistrates in alarm and despondency cases have played the fool on the bench," he asserts that "more than that the record does not permit anyone seriously to claim." Making allowance for the pressure which the imminence of invasion would seem bound to produce, we still must regard England as a citadel of civil liberty. And who will say that England is "soft"?

Broadly stated, our American method of protecting our liberties is the exact opposite of the British. By constitutional limitations we impose upon all government, including the Congress, the courts, and the executive, numerous and inflexible limitations. Our government does not have the full powers of most organized societies, partly because some such powers are reserved to the States, but also because many powers commonly exercised in Europe are withheld or forbidden entirely. Our devotion to the philosophy of limitation of power is so ingrained that the Congress and our legislatures adopt it as their policy and make very limited concessions of power to executive officers. The American assumption is that officers will abuse whatever powers they have. Too frequently the expectation is realized. Every period of our national history which has felt great stress and tension from abroad has left a trail in the administration of justice that we do not retrace with pride.

BAD LAW BREEDS LAWLESSNESS

However, I want to put it to you squarely whether the excesses in the administration of justice and in investigative techniques which have prevailed during times of public excitement and which our profession has rightly condemned as reprehensible, do not bear a distinct relationship to the very narrowness of the powers which are granted to our officials. I have found that the greatest pressures to overstep the bounds of lawful law enforcement arise in situations in which existing legal procedures permit *no action at all* looking toward the protection of society. Confession of inability to use the law for ends that are generally held desirable gives rise to a search for means outside the law or to a vigilante movement among the populace. It is certainly an open question whether a liberty to abuse liberty does not generate a danger to liberty itself. My confidence in the perpetuity of civil liberty in Great

Britain is due in no small degree to the knowledge that the law officers will be able to prevent such abuses of those liberties as would give rise to their impairment.

On the other hand, the greatest danger that I can see to American civil liberties lies in the fact that they are so rigid. The English officials responsible, by prompt and moderate actions, tend both to satisfy the public that abuses will not be allowed to reach the magnitude of a public menace and also to exert a restraining hand on the abusers. In America up to the present moment we have found no technique by which the outright abuse of these privileges is preventable even when abused in the interests of a foreign government.

To the future of the liberties we have known it is of utmost importance that our laws be made as effective as possible within constitutional and proper policy limitations. Lack of adaptability of antiquated statutes to present world conditions should be remedied. Deficiencies in the discretion to judges and to administrative officers should be remedied. Conflicts and confusion should be eliminated by restatement of our statutes. Let me suggest a few things that are happening that I think could be partially or fully remedied by adequate application of legal craftsmanship. The continued existence of these conditions is in my judgment as menacing to liberty as to safety.

ALIEN CONSPIRATORS GO FREE

We have over 6,000 deportable aliens, against whom proceedings have been completed and deportation orders are outstanding. But, because of transportation break-down or because of refusal of their native countries to accept their return, they are still here. They are not only here, they are *free*. They include some bad criminals and a considerable number of Communists proven to have advocated overthrow of our government by force and violence. But we can cite to the courts no statute to authorize us to do anything whatever with them when deportation fails. Hence, they are turned loose in habeas corpus proceedings and resume their evil ways in our society.

We have proposed remedial legislation. It is of great importance to the whole subject I am discussing. It needs the criticism where we are wrong and the help where we are right, of the organized lawyers.

Another example: We arrest foreign agents for doing acts detrimental to the country. The constitution commands bail. A little bail is fixed, put up by the help of their governments, and they walk out of the courtroom and return to their jobs of producing discord in America. We must find means to a more prompt and emphatic way of enforcing our own law. It is peculiarly a problem for lawyers.

OUR LAWS PITIFULLY WEAK

We have today definite knowledge that the sabotage of ships in our ports was ordered by simultaneous telegrams sent to all ships' masters. They tell us that themselves. Yet the law officers of the United States cannot intercept those messages and use them as evidence in our courts. The wires of America today are a protected communication system for the enemies of America. Here, again, we have proposed legislation, carefully limited legislation, to give us an equal chance on the wires with saboteurs. Again I say—if we are wrong, we need your criticism and if right, we need your help.

The whole field of combating alien-directed and financed propaganda against the policy of our government is one of infinite legal difficulty, as you know. I do not think we are completely and constitutionally helpless, but we are sharply circumscribed. May we not compel propagandists to identify their staff as we compel newspapers to disclose their ownership? Must we not only allow foreign attacks on our policy but also carry it for them in our mails? These are problems not easy of solution, they hit close to things fundamental in our life. Their solution is no job for amateurs.

And let me say to you that the enemies of America are not idle. They show up at Congressional hearings to oppose every move to strengthen our law enforcement; they show up in court astutely to raise every legal difficulty to prevent convictions and to obstruct obtaining evidence; they propagandize endlessly against investigative officials and agencies, against prosecution policies, against law enforcement itself. The force and prestige of the organized bar is needed to vindicate the competence of the law itself to deal with the burdens that the times put upon it.

I want to take this occasion to acknowledge free and generous cooperation from leading members of the bar who without compensation, are assisting us in the discharge of duties

—such, for example, as that of giving fair, impartial, and sympathetic hearings to conscientious objectors in the separate judicial districts of the nation.

I frequently have offers of services from my public-spirited fellows of the bar who want to offer their services, and I know that in professional organizations there is no lack of public-spirited men who would be glad to give their service if they could be mobilized.

I venture to suggest that nothing could be more helpful today than the organization under the auspices of some of our legal societies of a high-minded and disinterested group to canvass and appraise suggestions for putting our legal defenses in order. I say to you in all frankness that government lawyers are in a better position to tell you the problems than they are to work out the solutions. The pressure, the want of time, the burden of routine, and the commitment to departmental policy, prevent us from giving this sort of thing the quality of service it needs. You could bring to that task a quality of legal experience, of practical knowledge, and of public confidence in your disinterestedness which could be of inestimable benefit. I venture to suggest that the restatement and modernization of laws relating to defense in the light of modern emergency is as timely as any work in which the organized legal profession may engage.

If I could in one sentence state an appeal to my brethren at the bar, it would be this: "For the sake of your profession, your liberties, and your country, mobilize the great intellectual resources of your various societies in a master effort to put the law of national defense in order."

A Judicial Tradition That Encourages Ignorance

BY FRANK W. GRINNELL*

"I suggest that every appellate court in the country adopt a rule, or standing order, or an address to the Bar, to be published and widely distributed, stating that the court wishes, and expects, pertinent material in such legal periodicals as the local library facilities provide, to be called to the attention of the court in argument, or in briefs."

IN A LECTURE to the bar[1] on the preparation of briefs which will help an appellate court, Mr. Justice Qua, of the supreme judicial court of Massachusetts said:

"Look at the legal periodicals. We do not cite these because there is a certain tradition against it and, perhaps, it is wise, but there is no reason why you can not. . . There is a lot of useful material" in them.

This tradition is, I think, common in almost all appellate courts.

I respectfully challenge the wisdom of the tradition and venture to suggest to all appellate judges in every jurisdiction that the sooner it is abandoned, the better for the bench and bar and for the sound development of law. The reason for this challenge is that during the past half century or more, and today more than ever, much of the best law writing by some of the most suggestive and scholarly men in the profession has appeared originally, and often *only*, in law reviews. As far back as 1914, Dean Wigmore called attention to this matter in the supplement to the first edition of his work on *Evidence*. He repeated his remarks in section 8a of his second edition in 1923 (See Vol. 1, pp. 114-116), and again in the third edition, recently published in 1940, where the following passage appears (in Vol. I, Sec. 8a, p. 243):

"For years past there have been at the service of the profession more than a score of legal periodicals publishing the weightiest critiques of current legal problems. There is little in judicial opinion to show that these articles have ever been read; apparently their great labor and helpful thought have been wasted on the judges."

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1. See from *Writ to Rescript*, recently published by Little, Brown & Co. for the Boston Bar Association.

Wigmore's remarks about the "qualities of judicial decisions" (on pp. 242-246 of the same volume) deserve reading and reflection by judges in general.

In an article in the *Harvard Law Review* for December, 1940, by Messrs. Stone and Pette, they say:

"Legal periodicals are assuming an increased importance in the minds of judges, but, at present, their direct influence on decision is not impressive. The wealth of excellent material now lying moribund in them would be grist for the mill of law revision commissions which thus might well make practical use of much of the fine work of legal scholars during the past half century."

If I am not mistaken, the supreme court of the United States cites periodicals more frequently than other courts. The recent fiftieth anniversary issue of the *Yale Law Journal* for March, of this year, opens with an appreciation by Chief Justice Hughes, in which he says:

"The quality of the leading reviews . . . has won for them wide influence in giving direction to professional thought and thus in shaping the law itself as announced by the courts.

"I well remember that thirty years ago Mr. Justice Holmes would refer somewhat scornfully to the 'notes' in law school reviews which ventured, not always with modesty, to criticise pronouncements of the Supreme Court. I recall that at one time he admonished counsel who had the temerity to refer to them in argument that they were merely the 'work of boys.' He though the limit had been reached when what he had said in his judicial opinions was approved by the students as being 'a correct statement of the law.' But through the intensive discipline of the law schools and the selection of review editors from the best students, there has been a growing regard for these 'notes' as helpful analyses of decisions, while the articles contributed to the reviews by eminent legal experts have given lawyers and judges the benefit of wide research and exploration, not infrequently blazing new trails in preference to old but less desirable paths.

"It is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical. If some members of this 'fourth estate' of the law, conscious of their prestige and influence, may seem at times to assume an attitude approaching arrogance, they are at once subject to counter-attack and a balance of sound criticism is attained, with advantage to all concerned. It is idle to expect in legal discussion and judicial opinion, in relation to close questions of high importance, any greater unanimity of view than we find in other domains of human thought—art, science, or theology. And I think we may assume that a bench composed of law school professors or law review editors, impartially chosen, would exhibit views as varying as those of the judges whose works they appraise." (pp. 737-738)

In an article by Professor Maggs, on, "The Law Review and the Law," (in I *Southern California Law Review*, pp. 186-188) the subject is also discussed.

The trouble with the tradition against the citation of legal periodicals in opinions is that, as the opinions do not indicate that the courts are interested in anything but reports or standard text-books, neither the bar nor the judges of first instance have been trained to the constant use of periodical material. Of course any one familiar with a well-equipped law library knows that the periodicals are used a great deal so that some libraries have two sets of various reviews. We all know that the best informed judges welcome the material and information contained in them when it is called to their attention. Many of them try to keep in touch with such publications when they have time to do so. But many members of the bar are too busy or too indifferent to read things unless they have to. As the appellate courts appear to show so little *official* interest in legal periodicals in their *published opinions*, the bar in general neglects them.

Nobody, of course, will expect all busy lawyers to keep up with all the law reviews, or even with many of them. Their answer to such a suggestion would be like that of the late Mr. Gladstone in answer to a suggestion that, as a devout member of the Church of England, he should spend five hours a day in meditation and prayer. He wrote that in view of his duties as prime minister he could not do it. The late Professor Dicey said, "Jurisprudence is a word which stinks in the nostrils of the practicing barrister." The late Mr. Justice Darling, while still at the bar, expressed the same idea in lighter vein in the preface to his little volume published in the '80's under the title "Scintillae Juris." He said,

"A practical lawyer has little more occasion to inquire into the reasons which led to the passing of the statute *De Donis* than an artillery-man has to read Genesis. . . . A barrister spends his time to better purpose when he observes the conduct of men who infringe laws, than when he studies the motives of those who make them.

"It has often happened that eminent advocates have been poor lawyers, and great jurists bad advocates; and this need not seem strange to us. . . . It is in getting a verdict, as in getting anything else, you will obtain it the more easily if you know of no reason why you should not. . . . Laws . . . are regarded as a sort of *corpus vile* to be tugged hither and thither like the body of Valerius when . . .

. . . 'Titus dragged him by the foot,
And Aulus by the head.'"

This is all entertaining, but the serious aspect of it today, more than ever before, is that the common ignorance of very many members of the bar, including many leading practitioners and many good judges, as to what is going on in the profession within and without their own jurisdictions, as to the material relative to the development of law and the administration of justice, results in excessive conservatism as to suggested improvements and a "horse and buggy" standard of professional thought which is not adapted to the public needs in the administration of justice in a rapidly changing world. The simplest way to combat this unfortunate result is to encourage some familiarity with some of the legal periodicals and a habit of looking for information when needed by the use of the *Index to Legal Periodicals*.[2]

It is said, I believe, that the late John G. Milburn, an eminent member of the New York bar, for a period of some fifty years, made it a daily practice to devote fifteen or twenty minutes a day (no matter how busy he was) to the reading of something outside of his work. Other busy lawyers would learn a great deal if they followed this example, even once a week, in glancing through some of the legal periodicals.

But they need encouragement from the courts.

There are indications of a change in the attitude of judges in this respect.

The editor of Professor Maggs' article in 1930, quoted Judge Learned Hand:

"Much important discussion appears in the law journals, which may be of great assistance to judges in making any comprehensive examination, especially such as is out of the ordinary field of their researches. It is certainly most desirable that counsel should refer to them in their briefs, and I do not see why credit should not be given where credit is due, when the judges come to write their opinions."

The late Mr. Justice Cardozo is also quoted as saying:

"I have found law review articles of conspicuous utility in the performance of my judicial duties. This being so, I am unwilling to appropriate the learning of the authors of the articles without making due acknowledgment."

These remarks reflect a generous spirit of appreciation, but they miss the really serious aspect of the judicial tradition against the citation of legal periodicals. Authors of articles, and law review editors in general, are not primarily concerned with the receipt of complimentary remarks from the bench or bar in connection with their publications, however gratifying such remarks may be. They are engaged in shooting arrows into the air with the hope that they may "come to earth" somewhere and assist in some way in the sound development of law. They are glad to have the courts or the bar make use of the ideas expressed, with or without acknowledgment. The real trouble with the judicial tradition is the encouragement of intellectual *inertia*, the lack of encouragement of professional imagination and suggestiveness, and the tendency to develop *provincialism* in the bench and bar in general.

In an address before the Boston bar in 1821,[3] Judge Story said:

"It is impossible to look without some discouragement upon the ponderous volumes which the next half-century will add to the shelves of our jurists. The habits of generalization which will be acquired and perfected by the liberal studies which I have ventured to recommend, will do something to avert the fearful calamity which threatens us of being buried alive, not in the catacombs, but in the labyrinths, of the law."

These habits of generalization, which form one of the main objects of legal education, are fostered in the law schools, but, outside of law schools and for the continued education of professional men, much of the suggestive material has appeared, and will continue to appear, in legal periodicals. These same habits of generalization, to which Judge Story referred, have done a great deal more than he believed possible in 1821. With the increased volume of literature during the past century, and with the

2. Published monthly by The H. W. Wilson Co., 950-72 University Ave., New York City.

3. American Jurist, Vol. I, No. 1 (1829).

courts pouring out about 25,000 opinions annually, these habits are more important today than ever before.[4]

While the abandonment by appellate courts of the tradition referred to, and the adoption of a practice of more frequent, *discriminating*, citations of legal periodicals would help somewhat, something more is needed to attract the attention of the bar promptly and effectively. I suggest that every appellate court in the country adopt a rule, or standing order, or an address to the bar, to be published and widely distributed, stating that the court wishes, and expects, pertinent material in such legal periodicals as the local library facilities provide, to be called to the attention of the court in argument, or in briefs.

It would be an interesting experiment and it seems about time that Wigmore's suggestions of 1914, repeated in 1940, should be made the basis of an experiment in the place of a stultifying tradition.

4. Gray "Nature and Sources of Law" 2nd Ed. 280-281.

Jury Trial Tragic But Not Entirely Hopeless*

BY CLAUDE C. COFFIN, J.†

"The very commissions of which we complain are the bastard children of our jury system. Every litigant bilked by a verdict resulting from sympathy or lack of understanding or prejudice is just one more influence toward placing disputes under the jurisdiction of a commission."

SOME YEARS AGO as the result of a political campaign running in reverse so far as I was concerned I was tagged as the unlucky practitioner to give up what I considered a good and growing practice to serve a six year term on the district bench. In addition to the appreciation that that term would afford me the very best possible postgraduate law course (as it did in fact) I was consoled by the thought I would have the grandstand seat on the side lines to observe and study the workings of the jury and learn the secrets of procuring favorable verdicts. Now after using up considerably more than those six years, I readily confess that I know but little more than I did at the outset.

Upon occasion I have expressed to the members of the local bar associations in our district some of my ideas concerning this subject of jury trials. There is something said of a too talkative judge, and those expressions have apparently placed me in this my present trouble. . . .

It is said that "the jury is the last vestige of pure democracy." It may be a guard against tyranny and despotic government. Certainly it does, in criminal cases, leave the way open for a man's peers to refuse to enforce a law that to them seems harsh, if they be so minded; and those same peers can, and too often do, approximate and exercise the pardoning power; and in civil cases it permits the donation of one man's property to another according to what sympathy may dictate. And therein lies the cause of most complaint. Possibly the democracy is too pure. My remarks and suggestions here will be intended to apply to the trial of civil cases.

Doubtless no other workable institution can better determine the degree of care exercised by that uncertain, variable, elusive and mythical "reasonably prudent person." If the six or twelve men duly impaneled and sworn are in fact a cross section of the community they should be able to determine the standard of prudence required in that particular community at that particular time. Other than this statement in defense of our jury system, I sayeth not.

A mere recital of the methods of our jury system constitutes its indictment: The jury

*This address, entitled "Jury Trials," was delivered at the convention of the Colorado State Bar Association held Sept. 28, 1940.

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poll, supposed to be a cross section of the county community, is at the outset by statutory exemptions p u r g e d of occupational types wherein we should find the highest degree of intelligence and integrity; then the panel is further purged of busy, first rate business and professional men by individual excuses; from the "qualified" list of jurymen remaining are drawn the required number who in large majority have never before served as jurymen, and in the same majority without the least experience, untrained to the work at hand, in strange surroundings, and confused by unfamiliar procedure; then further peremptorily limited to those most likely to mind the parties and the pleaders rather than the cause itself; then at the outset of the trial, smarting from the embarrassment of voir dire examination, smothered in a haze by the conflicting opening "arguments" of counsel; too often not advised what the real issues to be determined are until they have received Instruction No. 1, even if then, and until all of the testimony is but a memory, if perchance even that; having been permitted to hear perhaps the controlling testimony but once, and probably without opportunity of knowing at the time that it might be controlling; generally without having made any memoranda or notes of the testimony to refresh their memory; bewildered by the objections and arguments and bickerings of counsel and the rulings of the court during the taking of the testimony, and subjected to prejudice, emotion and melodrama; advised concerning the law by long and technical instructions read rapidly in mumbled dignity; questionably assisted by assertive arguments of counsel; then advised by the oath administered to the bailiff that they may have nothing but water except by the indulgence of His Honor, they retire to arrive at an unanimous verdict.

Then in their private convenient place, influenced by we know not what or by whom among fellow jurors, without any particularly high degree of resistence to "mind neither the parties nor pleaders," without any necessity of disclosing how they arrive at their verdict, probably most conscious of the possible reaction of their friends and associates after the verdict is announced and they return to the street, with unrestrained tendency to give of the means of those supposed to be able, to those made to appear to be in need, irrespective of liability they determine what are presumed to be the facts and assume to apply those facts to the law that is supposed to be found somewhere in those instructions, and return into their box to proclaim their findings that must have the respect of a "true verdict." Truly there are fictions both in the law and in the practice. It has been well said: "If our present jury selection methods and jury trial system are sound then it must be that in all other respects our procedure is wrong."

All court officers, except jurors, are trained specialists: The judge, we must assume somewhat learned in the law, having a high sense of honor and responsibility, integrity and backbone, of more or less experience, able to focus attention upon the cause, eliminate extraneous influences, follow and weigh the evidence and apply the facts to the law; and the attorneys educated and trained officers of and assistants to the court. And yet the final determination and adjustment of the delicate balance of the rights and relationships of men are left to the jury, necessarily under our present system a rank amateur. Truly we leave "to a dwarf—the work of a giant." No other institution known is more unreasonable and unbalanced. *It is tragic; but not entirely hopeless.* Marked improvement may follow under the proposed new rules, and much can be accomplished under the present rules with the co-operation and stipulation of the litigants and their counsel.

TOO MANY EXEMPTIONS

Exemptions from jury service should be few and far between. I propose that most, if not all, of the present statutory exemptions be repealed; age and infirmity, and active service in some branch of the government, might remain. The jury lists prepared by the jury commissioners are, and should be, prepared with sound discretion in the first instance and each locality and occupation should be listed so as to furnish its proportional share in numbers. The matter of excuses and relief to individual jurors to be left to the discretion of the presiding or trial judge, as at present; any such excuses generally to be requested by the individual in a return of a questionnaire sent to each juryman after he is drawn and before he is summoned on the panel.

After our statutory exemptions have skimmed much of the cream from a true cross sectional

list of the community, of those remaining and drawn and summoned it is generally the best qualified person, the intelligent first rate business or professional man, who insists upon being excused. Excuses must be considered and granted conservatively; tact in handling a juror whose excuse is not granted may prevent his being in a vindictive frame of mind not desirable in a juryman.

The best educated professions are generally exempt. And merely by way of example: the busiest doctor can arrange his practice to spend time at the clinics, and he arranges to attend and remain in court when his affairs are being litigated. Why should he not give like time to the litigation between his fellows? With the assistance of the trial judge in staggering his attendance, and temporary relief that must at times be given to all, the best and busiest should be able to render his quota of jury duty. And so many of the statutory exemptions are without any substantial basis, as, for example, volunteer firemen and especially such firemen who have in the past been active but now have the certificates of five years' service. If the unlikely should happen and there be a conflagration at which even the active juryman's assistance were indispensable we could take a recess.

MY IDEAL JURY

If the actual facts in a case are desired, my ideal jury consists of not more than two or three jurymen; triers of the fact: to find and report the facts, and from those the law to be applied by the judge. And in the event the jurors are not of one mind as to any issue their separate findings may be reported, and the judge then to constitute an additional trier of fact and if his findings make a majority, such majority to control. I maintain that better methods of selection can be devised, but passing that, the jurors finally selected should serve, not only in a particular case, but during the trials of some or all of the cases then upon the trial calendar. Court experience affords the very training the juror needs to be able to follow the testimony and weigh and apply the evidence.

Such a jury, you may say, is no more than a commission, or referees, subject to the objections to the ever growing number of boards, commissions and administrative agencies that have already in great measure replaced our judicial investigations. Very well, why not use such a commission or board of fact finding "specialists" in our jury box, removed from the necessity of making their own investigations, having the aid of counsel for the contenders and the machinery of the courts to bring the evidence before them, under the guidance, supervision and assistance of the judge? The record before them is immediately the record of the court, subject to the immediate review by the trial court and later the appellate court. The very commissions of which we complain are the bastard children of our jury system. Every litigant bilked by a verdict resulting from sympathy or lack of understanding or prejudice is just one more influence toward placing disputes under the jurisdiction of a commission.

SUGGESTIONS FOR IMPROVEMENT

But whether the jury be of two, six or twelve, or other number of men, I have suggestions that may assist in removing some of the counts in the indictment of our system. Much can be accomplished under our present rules; more will follow under the proposed new rules; and some must await amendment of a rule or statute, unless there be stipulation by the parties in a particular case.

First, as to the voir dire examination: I note that the proposed new rules provide that the jury "shall" be examined by counsel. I hope that word will be changed to "may." That examination by counsel is too often one of the most useless and drawn out processes in our jury trials, and many times most harmful to the examiner's case. Generally a brief inquiry by the judge after disclosing the identity of the parties and the nature of the issues to be tried should be sufficient. At the most very brief questioning by counsel, should round out the picture, except where there is some real suspicion that a juryman is not acceptable. The jury list has been made available to counsel before the case is reached for trial, and ample opportunity has been afforded for inquiry in the community, as well as examination of the juror's questionnaire returned to the jury commissioner or clerk, and the well prepared counsel will already know the identity and the probable tendencies of most of those drawn on the panel. If a jury has been packed it may be assumed that the "packee" will not disclose that

fact. And any attempt to suggest the supposed merits of a litigant's case by long, tedious, repetitious and detailed questioning should not be permitted, and is of very doubtful expediency even from the standpoint of the counsel indulging. The lawyer who questions individual jurymen least avoids casting suspicion upon the justness of his case, and is using the best psychology. Challenges for cause should be used sparingly and, if at all avoidable, never for what might appear to the jury as a trivial cause. Protracted questioning and challenges for trivial causes necessarily arouse suspicion in the minds of jurors. The wise advocate will not want his client's case prejudiced by the suggestion that it should be tried only before a specially selected panel.

ORATORY NOT NEEDED

And before I leave suggestions to counsel, let us pass to the arguments. Mere assertive arguments are useless for any legitimate purpose before a properly qualified jury. Beyond assisting the jury in refreshing their memory as to the testimony and advancing reasoning that may help them weigh and apply the evidence, for use among themselves during their deliberations, counsel should not go. Oratory and hypnotism may control some juries, but generally argument beyond its ligitimate scope and length proves to be a boomerang.

But back to our jury. Each juror should have a reasonably comfortable chair with a table arm or sit at a table or desk, and should be provided with all the note paper needed.

At the commencement of the trial, before any statement of counsel, each juror should have before him either a copy of the portions of the pleadings framing the issues of fact, or better, a brief written statement of the respective contentions of the parties, framed from the pleadings or pretrial statement of cause, on the order of Instruction No. 1. In this respect the juror should have the same opportunity as the judge who has the pleadings before him to know and review the claims being asserted and apply the evidence as it is received.

Next, he should be encouraged in making notes and memoranda of the testimony. And the jurymen should be encouraged to let any uncertainties be known to the judge during the taking of the testimony. I do not suggest that jurymen take any part in the questioning, for that very often embarrasses counsel and court when the question is for some reason improper or calls for incompetent testimony. But a juryman may well pass a note to the judge such as, "it is not being made clear just what happened when, etc.," or otherwise indicating wherein the juror is seeking more light. Then the judge, either by suggestion to counsel or by questioning himself, may procure the more definite information; or be prepared to instruct the jury that the matter was not gone into because of incompetency or immateriality. In such matters a judge is now so hedged in by rule and precedent that he is of but little assistance to the jury, and in fact is not even an effective referee of the bout between counsel.

Although the judge is so circumscribed in his participation in the trial as to be almost powerless to render the practical aid needed by a juror, time is well spent in explaining to the panel the methods and reasons for our procedure, their province and duties, and so forth, and thus in some measure make up for their average lack of court experience. New jurymen seem to appreciate a little time in the "embryo school for jurymen" with the judge as instructor and before being sworn in a case.

In the instructions to the jury the issues would be reframed in Instruction No. 1 to correspond with the evidence and, when proper, any part of the issues included in the pleadings and preliminary instruction not supported by competent evidence would be expressly withdrawn from their consideration. No instructions as to the law would or should be given, except as such instructions on points of law and definition may be necessary to enable them to properly apply the testimony to an issue of fact. Instructions upon substantive law should not be required and should be unnecessary. Common sense would dictate that it should not be necessary for a juryman to know the law in order to determine a fact.

CAN JURORS KNOW THE LAW?

Common sense should tell us that our present "instructions" do not instruct. What good reason can be advanced for us to assume or attempt to educate a lay juryman as to the law during the short course of reading instructions, when we spend hours upon hours with a background of legal education? Why expect instructions from 2 to n, inclusive, to understandingly contain the law which, as to the matter covered, is in fact covered only by vol-

umes in our library, and concerning which none of us agree? Who would recommend that a surgeon attempt to instruct even his most competent nurses, to say nothing of laymen, concerning the proper performance of an operation according to conditions as they may be found, then lock them in the operating room there to remain until they have performed the operation and sewed up the incision? The nurses hand the instruments to the surgeon and he applies them to the delicate and important job. Why not have the jurymen hand the facts to the judge and let the judge apply them to the law?

Thus, verdicts would be exclusively special verdicts, reporting merely the facts. The jurors would be instructed only as to the fact issues and such matters of law and definition as are necessary to enable the jury to intelligently answer the interrogatories in the form of verdict.

If, during their deliberations, the jury find themselves not agreed or certain as to any part of the testimony, it should be made possible for such parts, at their request and with the approval of the court, to be read to them by the reporter or a transcript of the part of the testimony made and furnished them. There is no thought of objection to any review or re-review of any or all of the testimony by the judge having a case under consideration and advisement yet testimony once spoken in the hearing of the jury is presumed to have been filed and catalogued in the juror's memory, and controlling testimony must never be repeated lest it might in fact control.

Unanimous verdicts are but subterfuges except in the clearest of cases. If the jurors do not in fact agree according to the best judgment of each, they should not be required to compromise among themselves in order to be relieved from the case. They might well be permitted to report according as they do in fact believe, after careful deliberation; and from the balance or unbalance of majority and minority findings the court should be able to ascertain whether its own judgment together with that of the majority is sufficiently certain of the facts, or whether danger of injustice requires further investigation by a new trial.

The findings of fact being thus adjudicated, judgment would follow accordingly.

Reforms by a careful and conservative bar will, and should, take time. Changes in statute or rule should properly follow, and not precede, a real need for change. With such in view I hope and trust that discussions such as this will at least provoke serious thought and possibly result in some improvement in our approach to a satisfactory administration of justice.

Prompt Action on Revision of "Defense Law"

Readers of Attorney-General Robert H. Jackson's admirable address at the Judicature Society's annual meeting, beginning on page 6 of this JOURNAL, will be gratified to know that before its echoes had died away leaders of the bar were preparing to carry out its suggestions, and that as we go to press the work is in active progress.

Immediately after delivery of the speech President Simmons conferred with President Lashly of the American Bar Association, after which Mr. Lashly appointed a special committee on "Advancement and Coordination of the Work of National Defense," for the express purpose of complying with the attorney-general's request.

Judge Thomas D. Thatcher of New York was named its chairman, and the other members are Mr. Simmons, Mr. Lashly, Grenville Clark, former Attorney-General William D. Mitchell, Edmund R. Beckwith, George I. Haight and Philip J. Wickser, chairmen respectively of the national defense, bill of rights and budget committees of the ABA, and Walter P. Armstrong, nominee for presidency of the American Bar Association in 1942.

The committee is already studying and drafting legislation to remedy the conditions described in Mr. Jackson's speech.

Our Constitutional Protection of Guilt

BY CLAIRE B. BIRD*

Should the Constitution be amended by striking out the words " . . . nor shall be compelled in any criminal case to be a witness against himself" from the Fifth Amendment?

I say "yes." That exemption from being required to tell what one knows, has outlived its usefulness. Now no innocent person needs its protection, and rarely is it ever invoked for his protection. It has become solely the shield of the guilty to escape detection and proof of guilt. It has become a reproach to our judicial system.

The spectacle of organized gangsterism, its deliberate program of criminal robbery and organized murder, and the helplessness of our law enforcement against it, is the forced admission of a serious defect in our judicial procedure. The government has to be content with obtaining for itself through income tax collections a share of the spoils! What could be more humiliating? More damning?

Where is the trouble? Solely the protection against being compelled to disclose facts within the knowledge of the accused, which would, either entirely or as part of a chain of facts, result in conviction of the crime. Why continue this paralyzing protection?

Examination of reported cases seem to show that this protection is no longer relied on by an accused to prove his innocence. Instead it is relied on by an accused to exclude evidence tending to prove guilt—why? So as to escape for failure of proof! No innocent man needs to have the facts concealed. That is the need only of the guilty. The innocent man usually would want to have all the facts known. If innocent, all the better for his defense that there be full disclosure. An occasional trial in which an innocent man wants to conceal unpleasant facts (acts of which he may be ashamed, but not persuasive of guilt) can be so conducted as to meet both purposes. In some states, if not all, probate courts protect reputations under similar circumstances.

But how did this exemption originate, and why? It is concisely recited by the Supreme Court in Brown v Walker, 161 U. S. 591, at pages 596-7, thus:

"The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

So, as we see, the abuses which gave rise to it were the result of autocratic governmental power, no longer existing in the English-speaking nations. Those abuses, even in the exercise of war emergency authority, just will not return. If at all likely to, it could only be where

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our independent judiciary were utterly wiped out. In that event, of course, nothing else is really important.

That the danger of such abuses no longer exists is demonstrated by the institution and progressive extention of the right of pre-examination, by adverse examination and like advances in civil cases. No sound reason against the same right in criminal cases seems to exist.

But the abuses resulting from this constitutional limitation materially hamper civil efforts to do justice, as well.

To render the constitutional exemption effective it was essential that the prohibition should not be limited to proceedings in criminal cases. It must bar everywhere compulsory publicity of the prohibited disclosures. Hence the necessary rule that the privilege may be claimed in all proceedings where any witness is examined as to facts within his knowledge. The extent to which it goes is stated in 70 Corpus Juris, 721-2, thus:

"(4) *Proceedings to Which Applicable.* Notwithstanding the constitutional provision is worded simply that no person 'shall be compelled in any criminal case to be a witness against himself,' the privilege of refusing to answer extends to all proceedings sanctioned by law and to any investigation, ex parte or otherwise, litigious or not. The phrase 'in any criminal case,' as so used, has been judicially applied to proceedings under the executive, legislative, or judicial powers of government directed against the person invoking the provision, or against co-offenders with such person, or against unrelated third parties, and to such as are preliminary, collateral, or independent. So it has been held that the privilege may be claimed in civil actions and proceedings, as, for example, with reference to an answer in chancery, a proceeding for discovery, or for examination before trial, to interrogations of a party in equity before trial, to the examination of a bankrupt, or an insolvent or judgment debtor, to the examination of a trustee in bankruptcy before a referee, to proceedings to take a deposition, to investigations before grand juries, legislative committees, or civil service commissions, and to proceedings to enforce forfeitures."

It is quite obvious, it seems to me, that no extended discussion is needed to show how extensively this frustrating fortification bars the assaults to capture facts necessary to do justice in courts, and also in legislation and administration.

It is further evident, as the decisions hold, that in quite a large area of discretion the question whether one shall, or shall not be compelled to disclose facts must be left to the witness himself. Strange but necessary. To investigate the facts to enable a court to say whether the privilege is lawfully claimed can only be done by violating the privilege, if it in fact exists. It is like destroying democracy to preserve democracy!

Probably I might better end here. But a few incidental suggestions may be made.

It will be noted this repeal has nothing to do with those wise rules of public policy against compelling disclosures of confidential communications between husband and wife, doctor and patient, attorney and client, etc. They remain as before. They relate not to statements of fact known to the disclosee, but only to *communications*, that is admissions. The fact so admitted must be learned, if material, by independent questioning before a tribunal or authorized body.

Neither are we concerned with whether, if repealed, the exemption would be held to continue as a rule of common law. That question and its solution comes later.

But, it will occur, how make the repeal efficient, since the same clause is in most if not all the state constitutions? Congress has no power now, and should not be given it, to make any rule it wants to establish for federal matters apply to state matters as well. True, but let the federal government lead the way. The states that in time find the change wise, will follow. It is a long term program, but to my mind worth initiating.

A more fundamental objection might well be urged—do not tinker with the bill of rights. If you start with one thing, who knows what else will be assailed and perhaps endanger the whole? There may be some merit to this objection, but this reply seems more meritorious: the best way to preserve the bill of rights is to strike out from it anything that has become obsolete and now thwarts the purposes of justice. The preservation of rights is vital. An anachronistic rule that promotes injustice should be annulled however great the effort needed.

I write this article because I have a firm conviction that this sham "protection" more than

any other one thing is accountable for the maladministration of justice that provokes criticism of our whole judicial system. My hope is that our lawyer associations and law schools will discuss this glaring anachronism. If my estimate of its evil is well founded we must believe that such a black sheep among our prayerfully preserved "rights" shall be cast out.

Summary Judgments and a Proposed Rule of Court*

BY CHARLES E. CLARK†

THE SUMMARY JUDGMENT, as its name indicates, is a final judgment entered summarily by the court upon a showing that there is between the parties to a civil action no genuine issue of material fact requiring a formal trial of the action. Such showing is usually accomplished by affidavits of the moving party not adequately controverted by opposing parties. Through its use immediate adjudication is obtained of matters which ought not to be the subject of prolonged, time-consuming, and expensive judicial proceedings.

So simple and natural is the procedure that it might well have been a usual and ordinary part of judicial administration had it not been for the development of trial by jury. As is well known, the use of the jury led to the substitution of written for oral pleadings, and eventually to the formalized issue-making process of common-law pleading. When, therefore, any issue of fact was developed, it was reserved for the jury; and with the embedding of the jury-trial right in our constitutions, the judges naturally hesitated to dispose of issues framed by denials, even though the latter might turn out to be false or sham. There developed also accessory rules tending to the same result, particularly the rule prohibiting a "speaking demurrer," i.e., a demurrer which contained allegations or denials of fact and which did not confine itself to an issue of law, and the rule against striking a pleading as false or sham unless its defect was plain upon its face. Indeed, the summary judgment in this country has had to face attacks on its constitutionality; these it has surmounted successfully now that it has been settled that the court's undoubted power to strike a false or sham pleading may be exercised even though the falsity is shown by matter outside the formal pleadings.[1] Now, it is not considered necessary that a pleading should be filed and then stricken; the lack of any real opposition to the judgment can be shown without that formal step.

HISTORY

There were several early ventures in summary procedure in this country, one of which, the Virginia motion for judgment, has continued in effective use in that state to the present time.[2] Other states for many years have had partial summary procedure applying in particular instances; and New Jersey, in 1912, and Michigan, in 1915, adopted effective rules based upon the English system. In England, a rule adopted in 1855, applicable to actions upon bills of exchange and promissory notes, was expanded in 1873 and became an effective instrument in the administration of justice, accounting for 80 per cent of the judgments entered in the King's Bench Division. These rules were widely copied and even extended in the British colonies. The great impetus for adoption of the procedure generally in this country seems to have come from an unheralded rule of court in New York in 1921, which followed the English model. This rule (Rule 113)

*This timely article was written for the ABA Committee on Judicial Administration. It constitutes No. 5 of a series of monographs. As here published the bibliography is omitted.

†Judge of the U. S. Circuit Court of Appeals, Second Circuit. While Dean of Yale Law School the author served as Reporter to the Advisory Committee that drafted the Federal Rules of Civil Procedure.

1. General Investment Co. v. I. R. T. Co., 235 N. Y. 133, 139 N. E. 216; cf. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, 19 N. E. 2d 363, 120 A. L. R. 1395.

2. Chisholm v. Gilmer, 299 U. S. 99, 57 S. Ct. 65, 81 L. Ed. 63.

proved so effective in speeding up the calendar that it drew to its support able jurists and writers who have provided leadership for its extension in New York and elsewhere throughout the country. Connecticut, Rhode Island, Wisconsin, and Illinois are among jurisdictions which have made valuable contributions to the development of the procedure. With the adoption of Rule 56 of the Federal rules of civil procedure and the state systems modeled upon it, such as Arizona, it has become one of the major and most widely adopted of all modern procedural reforms.

TYPES OF SUMMARY PROCEDURE

The first forms of summary procedure, though adequate to demonstrate their utility, have been of limited scope. The trend has been continuous in the direction of their extension. Thus, the English practice, limited in substance to certain types of liquidated demand, was by 1933 extended to practicaly all actions except those for fraud, seduction, libel, and kindred matters. The New York rule originally applied only to a debt or liquidated demand arising on either contract or a judgment for a stated sum. The motion could be made only by a plaintiff and was in form one to strike the defendant's answer. A separate rule authorized a defendant to move for judgment on supporting affidavits raising certain designated defenses, such as lack of capacity of the parties, lack of jurisdiction, the statute of limitations. Later the plaintiff was permitted to move in a much wider variety of actions, including those for possession of chattels, foreclosure of a mortgage, specific performance of a contract for the sale or purchase of land, and for an accounting on a written contract. Its applicability to all actions has been extensively recommended.[3] The Connecticut rule was the broadest in scope of any rule at the time of its adoption in 1929, even broader than the Ontario rule. Bibl. (B) (3). But it has retained these restrictions with only minor changes. Indeed, until the adoption of the new federal rules, which by Federal Rule 56 swept away all these complicating restrictions, the general pattern of the reform had been one of stating its application in only designated, although steadily augmented, types of actions.

Such restrictions may have served a function in pointing to the kinds of proceedings where the new practice was obviously convenient and useful. But they proved more a burden than a help because their not wholly clear limits required definition and redefinition by the courts, they forced some return to specialized pleading in special motions for different steps in the proceedings, and they excluded many cases where the device would be most useful. Other complications also developed. Thus in New York the motion was made available also to defendants, and it has now been decided that a defendant may move for dismissal in any type of case, and is not limited to the actions specified in the rule, as are plaintiffs.[4] Again much question has arisen as to whether or not a question of law can be tested by the procedure, a case where really it is most useful, as the present practice shows. In Connecticut this problem was met by requiring a defendant, when only a question of law was involved, to file a pleading appropriate to testing that issue. Experience therefore seems to afford a convincing demonstration that all complicating restrictions should be rejected as in the federal rule.

RELATION TO MODERN PLEADING

The essence of modern pleading is the generalized form of statement which gives fair notice of opposing claims, but avoids the detailed particularization of the old special pleading. A case cannot be tried and concluded on the paper pleadings against the desires of a litigant or his counsel, and the time spent in refining the allegations is not worth the cost in actual results. Hence the trend is to such simple forms of allegation and denial as are shown by the forms attached to the new federal rules, which are designed to indicate "the simplicity and brevity of statement which the rules contemplate."[5]

Under such a system of pleading, procedure for entering summary judgments, for making pre-trial orders, and for extensive discovery before trial is most valuable, if not indispensable. All these are devices to enable the parties

3. N. Y. Commission on the Administration of Justice, 1934, 287; Third Report N. Y. Judicial Council, 1937, 30.

4. Lederer v. Wise Shoe Co., 276 N. Y. 459, 12 N. E. 2d 544.

5. Federal Rule 84; 23 A. B. A. J. 976; 25 ibid. 22; 23 Wash. U. L. Q. 297, 308-319

and the courts to reach to the heart of the matter in dispute. These are the more necessary for prompt and effective adjudication of litigation as we realize that the formal allegations of the parties in actual experience have never served this function and as we relegate them to their functions of notice and of furnishing the basis for res judicata when the case is closed. Both the pre-trial conference and deposition and discovery procedure may often disclose that either there is no substantial issue for trial or it is one of law only. Hence the new federal rules provide for summary judgment to operate either as a part of or as an efficient corollary to these devices.[6] With these assisting means, the new generalized pleading avoids the delays and pitfalls of the old special pleading, while at the same time it more quickly brings about adjudication on the merits.

POSSIBLE ABUSES OF SUMMARY PROCEDURE

Possible abuses of the new practice do not seem to involve dangers of denial of the jury-trial right, as was apparently feared originally. Indeed, as textwriters have suggested, the courts have been, if anything, overhesitant in granting the relief. Dangers, if any, are likely to be of a different nature and to involve not injustice, but conceivably waste motion. If the procedure is resorted to regularly in cases where there is only remote possibility that the judgment will be granted, it is possible that a practice may develop somewhat comparable to the old dilatory motions and demurrers which tended to delay, rather than promote, adjudication. But as we have seen, restriction of the remedy to certain simple liquidated demands is not a successful way of avoiding potentially vain resort to the procedure. Experience, however, does not yet show any undue attempt on the part of litigants to make use of the remedy or to employ it only for the purposes of delay. Seemingly it is not peculiarly susceptible to such use, certainly not in any such degree as the old dilatory motions and demurrers, since it is more designed to secure speedy adjudication than delay; and a party will hardly risk inviting such speedy result unless he has some grounds for believing it will be in his favor. In any event adjudication may be facilitated, where, as under the Federal rule, 56(d), provision is made not only for partial summary judgments, but also for pre-trial orders limiting the issues remaining to be tried to those actually and substantially controverted. And should litigants in any court develop a trend toward abuse of the practice, the remedy is simple and well within the discretion of the trial judge, who may quickly deny, as well as grant, the motion. In sum, there is clear and demonstrable gain, and little, if any, risk, in the adoption of a broad all-inclusive form of rule based on the federal model.

AN ALL-INCLUSIVE RULE

(a) WHEN HAD. A party seeking to recover upon, or against whom is asserted, a claim, counterclaim, or cross-claim, including a demand for a declaratory judgment, may, at any time after an adverse party has appeared in the action, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. The motion shall be served at least [10] days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.

(b) SUMMARY JUDGMENT ON OBJECTION OF LAW. Every objection to the legal sufficiency of a claim or defense, whether by way of demurrer, answer, reply, or motion to dismiss or for judgment or other motion, shall be deemed to pray for a summary judgment in addition to such relief as may be appropriate according to its express terms. It may be heard and disposed of as hereinafter provided, and may be likewise supported or opposed by affidavits.

(c) PROCEEDINGS ON MOTION. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substan-

6. Federal Rule 56(d).

tial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHUR TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

AUTHOR'S NOTE.—Subdivisions (a) and (c) are from Federal Rule 56 (a)-(c) modified to permit the plaintiff also to move for summary judgment before an answer is filed; subdivision (b) is new. Subdivision (d) to (g) are identical with Federal Rule 56 (d) to (g).

Subdivisions (a) to (c) may provide a shortened form of the rule; but the more detailed provisions seem preferable.

Bar Presidents Need Training

There are still a good many lawyers who can remember when their state bar association had a membership comprising less than half of the body of practitioners and when attendance at the only meeting held each year was less than one-fourth of the membership. Under such conditions the office of president was a prize. No responsibility was attached except to prepare the president's annual address, with a year to do it. The secretary did the work.

There are still some voluntary and exclusive state associations that adhere to the old practice of choosing a president just before adjournment of the annual meeting. Such a president now takes office expecting to devote much time to the association's policies. But he may begin with no knowledge and little interest.

In every state having an inclusive, organized state bar, there is a council or board of governors which exercises all administrative power. The council chooses from its membership a chairman or president and shares with him the making and executing of bar policies. Management is in the hands of council members representing all parts of the state, at least two-thirds of whom have had previous experience.

There is no reason why voluntary associations should not adopt the organization that has been so successful where integration exists. That has been done in Colorado, under a constitution which makes fifteen local associations, comprising the entire state, members of the State Bar, with one representative on the governing board for every one hundred members.

This organization, as told in this JOURNAL (22:132), was effected in 1937-8, when Wilbur F. Denious was president. At the beginning of the movement the State Association had only 200 members and a debt of $1,500.

Concerning the problem of selecting only

experienced members as presidents Mr. Denious has this to say:

"In the Colorado Bar Association we have adopted a simple device which has largely solved the difficulty. We elect each year a president-elect who becomes president automatically one year from the time of his election. During this interim he is ex-officio a member of the board of governors and of the executive committee, and thus has an opportunity to become thoroughly acquainted with the work of the Association and also of sizing up his predecessor's program and making his own plans for his own term. Until this device was adopted our presidents didn't know they would be called upon to head the association until the day of their election and by the time they became acquainted with the work of the association and formulated their own plans and got them into working shape their terms expired.

"Since this plan was adopted we have had experienced and interested presidents, and it has brought splendid results. You will be safe in suggesting it to others."

Give Pretrial a Trial

BY JUDGE CARL A. WEINMAN*

WHY NOT INTRODUCE pretrial procedure at your fall term of court, 1941?

The various articles that have been published by the American Judicature Society have been responsible to a great degree for the initiating of pretrial procedure in Jefferson County, Ohio. Jefferson County has a population of approximately 100,000 people. It is an industrial and farming community. The court of common pleas is presided over by two judges who dispose of approximately 1,000 cases per year. Pretrial procedure was initiated by the court in September, 1940, for the consideration of 270 jury cases. The results are interesting. By means of these pretrial conferences 103 cases were either settled, judgments taken, or the matter dismissed. Additional matters of pleading were granted in 60 cases. Admissions were agreed upon in 14 cases. Settlements were considered in 102 cases. Juries were waived in 12 cases. Depositions were found to be necessary in ten cases. Based upon actual trial and experience the initiating of this pretrial procedure was extremely productive of results,[1] and the court has decided to follow this procedure by a regular assignment of pending jury cases during the month of September of each year. By following through with the ideas suggested in the pretrial conferences, 59 more cases, when regularly assigned for trial, were settled or dismissed. These 59 cases were included in the 102 cases in which settlements were considered during the pretrial assignment in September, 1940, and were disposed of as a direct result of the pre trial conferences.

The surprise, however, in addition to the results accomplished, is the attitude of appreciation upon the part of the general public. Each court adopting this plan will do much to restore the confidence of the public in regard to the use of our courts as a desirable forum for determining disputes. It is the general consensus among laymen that this new type of procedure applies true, sound and cooperative business principles to the administration of justice. Various articles published in the local newspapers with reference to the success of pretrial practice have caused favorable comment upon the part of the citizens of the community.

Pretrial procedure has been approved for the federal courts by the supreme court and the congress of the United States. The American Bar Association and the American Judicature Society are enthusiastically encouraging it. The reading of the various articles that have been published by the American Bar Association and in the JOURNAL OF THE AMERICAN JUDICATURE SOCIETY should convince every judge in respect to the wisdom of adopting it. This sound, efficient, business-like practice should be used by all courts. It is true that this procedure had its inception in metropolitan areas as a measure to relieve congested dockets, but in view of our experience in a smaller

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1. Summarized in the Ohio Bar Association Report, Volume 13, No. 24, dated November 11, 1940, page 475.

county, it is suggested that pretrial procedure can be just as successful in its use in the smaller counties as in the metropolitan areas. It works just as effectively in all places and applies equally well in all jury cases no matter whether those cases are on a congested docket or whether the court is up to date with its work.

Every court in the United States of county-wide jurisdiction should, at least, give this new procedure an opportunity to be tested in its particular community. Each court is confronted with different problems. It is sometimes difficult to determine whether the local bar association or the judge or judges of the court should recommend its adoption. The real purpose of this article, based upon the actual trial and experience of two judges in a smaller community, is to interest other judges in establishing pretrial procedure. There still exists a difference of opinion among the members of the bar with reference to the value of pretrial conferences. Some lawyers cannot be convinced of its merits until it has been actually tried and tested. Initiating of this procedure, therefore, in most cases, should be inaugurated by the judge of the court in cooperation with the local bar association. Experience has demonstrated that the plan of pretrial will produce results, but there are certain places where the lawyers or the court do not want it to work, and there are other places where the courts do not properly initiate and follow the correct procedure. The exact measure of success will depend largely upon the personality and ability of the judge presiding at the pretrial conferences, and the cooperation of the attorneys representing their various litigants.

May I suggest a simple procedure to be inaugurated by the presiding judge? During the summer months lawyers have an opportunity to investigate their cases, check their pleadings, and to partially prepare each case for trial. The month of September, therefore, is an excellent month to consider pretrial conferences for pending jury cases. In the State of Ohio section 11381, General Code, provides as follows:

"The clerk shall make a trial docket at least twelve days before the first of each term, and the cases shall be set for particular dates in the order in which they stand on the appearance docket."

Section 11389, Ohio General Code, reads:

"Before the first day of the term the clerk shall make a copy of the trial docket for the use of the bar."

Comparable legislation exists in the States of Alabama, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, Pennsylvania, Tennessee, West Virginia and Wyoming.[2] Many courts have questioned the value and the expense of such a trial docket, and in many counties these statutes are not strictly followed. In Jefferson County, Ohio, in July, 1940, the judges determined to use the trial docket for the September term of court as the means of initiating pretrial procedure. The Court placed upon its journal an entry providing for pretrial conferences.[3] The attorneys were informed of the initiating of this pretrial procedure when they received the trial docket for the September term of court. Each pending jury case was listed for hearing at a certain time on a certain day during the month of September. The rules to be followed were printed upon the trial docket or, what was

2. See, for example:
Ala. Code 1928, §9487.
Conn. Gen. Stat. 1930, §5624.
Idaho Code 1932, §7-107.
Ill. Smith-Hurd Rev. Stat. 1933, ch. 110, §259.23.
Ind. Burns' Stat. 1933, §2-1103 et seq.
Kans. Rev. Stat. 1923, §60-2930 et seq.
Ky. Carroll's Civil Code 1938, §349.
Mich. Comp. Laws 1929, §14252 et seq.
Mo. Rev. Stat. 1929, §1829 et seq.
Penna. Purdon's Stat. 1936, title 17, §1901 et seq.
Tenn. Williams' Ann. Code, §10052.
W. Va. Code 1937, §5635.
Wyo. Rev. Stat. 1931, §89-1206.

3. Journal Entry of Court. In the Matter of Pre-Trial Proceedings.

In any action the Court may, in its discretion, direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The Court may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admis-

called, the "pretrial assignment."[4] The first pretrial conference was assigned for 9:30 each morning and a different case was called each half hour during the day, following the trial docket which designated the time of the day for the pretrial conferences. It is suggested that this time limit be extended so that each case be allotted forty-five minutes for consideration. In many cases it is difficult to complete these conferences in thirty minutes.

Better results were accomplished by conducting these pretrial hearings in the judges' chambers. Attorneys were permitted to have their clients present if they desired to do so. Stenographers were not present but any agreement that was entered into was reduced to writing and made a part of the record in the case. In many cases it was necessary to continue the conference for further discussion at a later time during the month of September, which time was definitely fixed by the court.

The purpose of pretrial is to consider and analyze the case. Judges, therefore, should direct equal attention to each question that is listed to be discussed before any question of settlement is considered or suggested. The primary purpose of pretrial conferences is not to settle cases but, if as a result thereof something by way of adjustment can be accomplished, then one of the purposes of pretrial has been served. If judges limit these conferences to only a consideration of the question of settlement of the case, then the court cannot expect to have the full cooperation of the attorneys, and the procedure will not be successful. No pressure should be exerted by the court, and since each party is properly represented, the judge sitting at the pretrial conference should not be disqualified from trying a jury case.

The initiating of pretrial conferences by this simple procedure during the month of September in each year, has received the full approval of the lawyers of our bar. The psychological aspect of having pretrial conferences during one month of the year has appealed to our attorneys. There are no jury cases assigned for jury trial during the month of September. The court, therefore, receives the cooperation of the entire bar for one full month to help the court and their clients in securing successful pretrial conferences. The benefits derived from the first conferences, at least in our experience, have made the attorneys more cooperative and better prepared in the consideration of their remaining cases to be heard upon the pretrial assignment.

Each judge owes a duty to his community to initiate pretrial conferences. From the results obtained it is conscientiously felt that any judge initiating this practice and following its ultimate purposes, will never hesitate to make pretrial procedure a necessary part of the court assignment. This procedure is simple. The results are beyond expectation. Costs to the litigant and costs to the taxpayer are greatly reduced. Each party is assured of a fair trial because the agreements that may be entered into are voluntary agreements. Any suggested opinions of the court are reviewable. The rights of each party are fully protected. If the meeting is successful in any degree, the results benefit all parties. There can be no adverse effect upon anyone connected with the case. Judges will be rewarded in many ways for the introduction in their community of sound, cooperative business principles to the administration of justice. As a judge who has observed the efficacy of this medium, and the splendid results which it has accomplished, may I recommend the initiating of pretrial procedure by other interested judges.

Why not introduce pretrial procedure at your fall term of court, 1941?

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sions or agremeents of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The Court, in its discretion, may establish a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

4. Suggested assignment form.

Pretrial Assignment

IMPORTANT

This is your first pretrial assignment of all pending jury trials.

The success of pretrial conferences depends entirely upon the cooperation of all attorneys.

Please arrange to be in court promptly at the time your case is designated for hearing on this assignment. Be prepared to discuss the following matters.

1. Pleadings.
2. Waiving of jury trial.
3. Number of witnesses.
4. Length of time for trial.
5. Convenient time for trial.
6. Agreeing upon the admissibility of the exhibits without preliminary proof.
7. Prospects for settlement.

Key-Number System Guarantees Competent Jurors

TEN YEARS of experience with the key-number system of selecting prospective jurors has fully justified the extravagant claims made for it after a first year test in Cleveland. This system has served equally well in Los Angeles, and in Detroit's great criminal court it has a continuing record of complete success over a period of eight years.

In ten years a perfect system of providing jurors capable of understanding most of the language used by witnesses, lawyers and judges should have been adopted widely. The system is just as applicable to thinly populated circuits as to metropolitan courts. Failure to adopt this system in a great majority of the states must be attributed to the fact that the general public can be aroused to support needed legislation only through the leadership of judges and lawyers. Elected judges do not openly criticize a defective mode of making up a list of prospective jurors. Individual lawyers can influence public opinion only through their bar associations. If bar leaders could understand that a perfect system exists, that a higher degree of public respect could be won for jury trial and that the result would be beneficial to the entire profession, there would surely be great accomplishments.

Under the key-number system, which originated in Cleveland, every twentieth or twenty-fifth name on the registered voters' list is taken as a generous basis for selection. There will be about four times as many on this list as are actually needed in the courtroom. The list will consist of a true average of citizens, distributed through all the wards and townships in an equal proportion.

There's the foundation. This large number of potential jurors will be requested by letter to call at the office of the jury commissioner, or the court clerk's office. In large cities there will be a constant and fairly even volume of candidates. In average counties one day a week would suffice and in the smaller counties one day, or half a day a month. In Detroit the system has saved over $30,000 a year.

The prospective juror is handed a printed questionnaire and asked to supply answers. On the basis of his answers the selection is largely automatic and final. Unsatisfactory answers mean a dismissal of the prospect. A simple, practical, swift, economical and entirely impersonal selection will have been made as to a large majority of those who respond. Where there is doubt notwithstanding fairly good answers the official will go farther in testing. Annual reports made by the Detroit jury commissioners show that 87 per cent of those to whom letters are sent appear at the office; that 70 per cent of those who appear are rejected, which would indicate a high standard of selection. The possibility of requiring a juror to serve a second time is very small. Jurors are given the great privilege of choosing the approximate time of service.

But this need not mean that every fortnight or every month cases must be tried to a jury wholly inexperienced. Not at all. In Detroit, where the period of service is two weeks, half of the quota is injected every week. It is virtually certain that in every case there will be some jurors who have become oriented. In the latter half of every week this proportion of seasoned jurors will be very high.

It is difficult to find any flaw in the system. Of course in a small community a single official could be lenient in excusing citizens, and could yield to requests for accepting some who were unfit. But at the worst the lawyers, who in such a community would easily become acquainted with the entire panel, could exclude the unfit by peremptory challenges. The management of the system of selection, we must assume, should be in the judiciary, and this would mean usually in the single judge of each district. The utterly impersonal nature of the choosing will inevitably yield a high percentage of the citizenship presumed to be best able to render verdicts.

The key-number system was first instituted in Cleveland. Newton D. Baker, then President of the Judicature Society, was a leader in this highly successful experiment.

Nearly all that has been printed on the subject will be found in the files of this JOURNAL: 15:8, 186; 19:113; 21:222; 22:209; 225, 226, 265.

Current Literature

BOOKS

Frontiers of Legal Aid Work, edited by John S.Bradway. Vol. 205, Annals of the American Academy of Political and Social Science, Philadelphia, September, 1939. 225 pages, $2.50 cloth, $2.00 paper.

Legal Aid Records and Standards, compiled by John S. Bradway. National Association of Legal Aid Organizations, Emery A. Brownell, Secretary, 25 Exchange St., Rochester, N. Y. 647 pages, mimeographed. $3.00.

These are two useful contributions to legal aid literature by the recently-retired secretary of the national association. Previous volumes of the *Annals* in March, 1926, March, 1928, and September, 1929, dealt with the legal aid movement of that decade. The present work is "designed to show the further progress made and the type of problems with which the organized legal aid movement is now engaged." It contains twenty-one contributed articles on legal aid technique, structure of legal aid organizations, and an objective view of the work.

The other volume is a collection of committee reports and deliberations of the national association gathered from the stenographic records of the conferences. These have been arranged by topics, making readily accessible in one place all that has been said and done in the conferences on a given point. Subjects covered are records, standards, financial accounting, defender in criminal cases, and publicity. The editing is excellent, and the 647 pages contain an enormous amount of valuable material.

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From Writ to Rescript: The Practice of the Law, Boston Bar Association, edited by Dennis A. Dooley and John T. Donahue. Boston: Little, Brown and Co., 1940. 306 pages, $2.50.

This is a series of twenty-eight lectures on the practice of law for young Boston lawyers. Its ideas are equally useful elsewhere, and it wins a recommendation here for its fine emphasis throughout on the lawyer's role as an agent in the administration of justice as well as an advocate. Judge McLellan's suggestions on how to get the most out of a pretrial hearing, and Judge Putnam's observations on courtroom conduct are noteworthy.

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The Dallas Bar Speaks, fourth annual yearbook of the Bar Association of Dallas, Texas, published in 1940 for the year 1939. 336 pages, private distribution.

This attractive volume continues to set a standard for bar association annual volumes. It gives a clear picture of a year's accomplishments of an active bar association, and the twenty-six luncheon addresses reprinted in it contain much material worthy of permanent preservation.

ARTICLES

"A Vindication of Simplified Pleading," Harry M. Fisher, 35 *Illinois Law Review* 270-281, November, 1940.

"Pretrial Procedure in Wisconsin," Clarence P. Nett, 13 *Wisconsin Bar Bulletin* 243-250, November, 1940.

"Pretrial Procedure as It Affects a Metropolitan Area," Ellis R. Diehm, 13 *Ohio Bar Ass'n Report* 456-467.

"The Operation of Pretrial Procedure in a Smaller Community," Raymond S. Buzzard, 13 *Ohio Bar Ass'n Report* 468-473.

"Pretrial System in the Municipal Court of Chicago," Oscar S. Caplan, 22 *Chicago Bar Record* 164, January, 1941.

"Chief Justice Urges Effective Plan to Give Courts Rule-Making Power," Phil S. Gibson, 15 *Calif. State Bar Journal* 331-336, November, 1940.

"A State Department of Justice," Karl C. Williams, 29 *Illinois Bar Journal* 173, January, 1941.

"The Poor Man's Court," George L. Quilici, 22 *Chicago Bar Record* 111-113, December, 1940. See also editorial, p. 141, and letters to the editor, pp. 170-171, January issue, and letters, pp. 212-216, February issue.

"The Business of the United States Courts," Henry P. Chandler, 21 *Boston Univ. Law Review* 3-19, January, 1941.

Review of Judicial Council Reports

MASSACHUSETTS

The Massachusetts trial justice system, wherein certain lawyers divide their time between judicial duties and the practice of the law, has long been in disfavor with the judicial council of that state, and a large part of its sixteenth report, filed with the governor on January 13 and published in the *Massachusetts Law Quarterly*, is devoted to a consideration of how to attain the objective of "full-time judges, adequately paid."

An elaborate study of work loads in the various judicial districts, supported by more than twenty statistical tables, leads to the recommendation that a beginning be made in Suffolk County, where there is no danger of having a full-time judge without a full-time work load. The council recommends the abolition of the remaining trial justices in ten different towns, all of them within the jurisdiction of a district court, on the ground that they are not now needed. It also recommends repeal of an act requiring motor vehicle tort cases to be filed in district court, since so many of them are appealed to the superior court. A draft act to accomplish the recommended changes is included.

With the tempting title, "How Boston Can Save Money," the council renews a recommendation first made about twenty years ago that the volume of criminal appeals and double trials be reduced. Appeals from district to superior court in criminal cases are almost a matter of course, and the council thinks the remedy for all this financial waste is to give all defendants one day in court, not two. Reference is made to draft acts previously recommended.

The Council renews its previous recommendations for regulation of procedure by rules of court, and for a state-wide integrated bar. Included in the report is a review of bar integration in the United States and the advantages to be gained by its adoption.

Reports submitted in response to requests of the legislature on defamation by radio, common trust funds, intermediate appeals and common law assignments, and a number of recommendations for specific improvements in the law make up the remainder of a very interesting and valuable report of an active judicial council.

Frank J. Donahue is chairman of the council, and Frank W. Grinnell is secretary.

OHIO

The fifth report of the judicial council of Ohio was presented to the general assembly on January 6. It proposes extensive changes in civil procedure, three amendments to the state constitution, and additions to its own personnel.

The proposed bill to revise the code of civil procedure occupies thirteen pages of the report and embodies ten important innovations recommended by the council after a study of the new federal rules. Most of them were in the 1939 report. The council recommends pretrial and summary judgment procedure, broader use of interrogatories and documentary evidence, simplification of the use of counterclaims, and certain changes in connection with commencement of an action and service of summons. Section seven recognizes the rule-making power of the supreme court and provides that the judicial council will be the agency to consider and recommend proposed rules. Says the introduction to the report: "The trend in all states is toward court control. It is merely a question when Ohio shall fall in with this trend."

The three constitutional amendments are to eliminate the distinction between law and equity on appeal and provide for appeal from orders as well as judgments, to eliminate the use of the indictment except in homicide cases, and to abolish the short judicial terms that occur after the filling of a vacancy by appointment.

The council recommends that the attorney general, the judiciary committee chairmen of the legislature, the state bar president and the

supreme court reporter be added to its members.

Chief Justice Carl V. Weygandt is president and Professor Silas A. Harris is secretary.

RHODE ISLAND

The tenth report of the Rhode Island judicial council, its second since it was revived in 1939 after a lapse of five years, appeared in December, 1940, with ten bills embodying eight recommendations for the consideration of the 1941 legislature. They include simplification of the handling of minor traffic cases, establishment of reconciliation procedure in domestic relations matters to reduce the number of divorces, vacation sessions of the superior court for the hearing of motions, clearing of dockets by dismissal of stale cases once a year, improvements in probate and appellate procedure, and certain extensions of the original jurisdiction of the superior court.

A proposal for self-discipline of the bar through a board and investigating committee deserves comment. There is at present a disciplinary bar committee which investigates complaints and makes recommendations to the supreme court. The bill does not contemplate diminishing the court's jurisdiction in any way, but it does strengthen the committee by giving it subpoena power, and it gives the board power to suspend from practice or disbar, subject to appeal to the supreme court. Although the Rhode Island bar is not formally integrated, its small, compact group of lawyers has enjoyed many of the benefits of integration for a long time. Passage of this bill would bring Rhode Island a step closer to *de facto* integration.

Albert A. Baker is chairman of the council, and William A. Graham is its secretary.

New Members Through May 15 Total 523

Following are the names of 339 persons who accepted invitations to join the American Judicature Society between January 15 and May 15, 1941. Added to the 184 printed in the February JOURNAL, these bring the total since November 1 to 523. Additional acceptances received after compilation of this list brought the total close to 550 before this number of the JOURNAL went to press.

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MARSHALL VAN WINKLE, Jersey City
JOSIAH STRYKER, Newark

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EMERY A. BROWNELL, Rochester
WILLIAM L. CLAY, Rochester

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